No....3953.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL CIGAR COMPANY, INC., a Corporation,

Plaintiff in Error,

vs.

FIRST NATIONAL BANK OF PORTLAND, Oregon, a National Banking Corporation,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

On Writ of Error to the District Court of the United States, for the District of Oregon, Honorable Charles E. Wolverton, District Judge.

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STATEMENT

(The numbers in parenthesis throughout this brief, unless otherwise stated, refer to pages of the Transcript of Record.)

The plaintiff, General Cigar Company, Inc., is a New York corporation engaged in the wholesale and retail tobacco business with branches in a number of cities including Portland, Seattle, and Spokane. The

defendant, First National Bank of Portland, Oregon, is a national banking corporation and has been for many years the bank of deposit used by plaintiff's Portland branch.

This litigation presents for determination the question as to which corporation, the First National Bank or the General Cigar Company, should bear the loss resulting from the dishonest acts of one Neil W. Turrell, an employee of the plaintiff, accomplished through the cashing of checks at the defendant bank in the manner hereinafter stated.

Plaintiff's complaint presents eleven causes of action. As two of these, the 7th and 8th causes of action, were eliminated by stipulation of the parties, we are now concerned with but nine of these causes of action. In the first cause of action it is alleged that on or about December 13, 1919, plaintiff's Spokane branch drew a check on the Spokane and Eastern Trust Company, a bank located at Spokane, Washington, payable to itself in the sum of $1,293.58, which check was transmitted by the Spokane branch to the Portland branch. The Portland branch received the check and endorsed it with a rubber stamp endorsement in form substantially as follows: "Pay to the order of First National Bank, General Cigar Company, Inc." The exact form appears on page 4 of the Transcript. This form, it is alleged, was one uniformly and continuously used by the plaintiff for purposes of deposit in defendant bank. It is further alleged that Turrell wrongfully and without authority from plaintiff converted this check to his

own use and that he procured the defendant bank to cash the check paying him the face amount thereof; that subsequently the defendant bank presented the check to the drawee bank and received the sum for which it was drawn but that defendant had not paid plaintiff or credited its account with the sums realized on the check cashed as aforesaid for Turrell, and that by reason of those facts it became justly indebted to plaintiff in the face amount of the check. The remaining eight causes of action in which we are now interested follow the allegations of the first cause of action but involve additional checks, some of which had been drawn by the Spokane branch on the Spokane and Eastern Trust Company and others had been drawn by the Seattle branch of Plaintiff's company on the Union National Bank, a Seattle bank. It will be observed that the first check involved in this action was drawn on December 13, 1919, and the last check on November 26, 1920. The total amount of these checks is $10,077.60.

A demurrer interposed to this complaint was overruled and the defendant answered. The defendant made certain denials and pleaded four defenses affirmatively.

The first defense (32) alleged that the plaintiff had three accounts with the defendant, and that Turrell was authorized by power of attorney to withdraw moneys from each of these accounts, and that plaintiff was also authorized to cash checks such as the ones concerned in plaintiff's complaint. This defense is, therefore, sub-

stantially that Turrell had authority to cash the checks as he did in behalf of plaintiff.

The second defense (34) alleges that the plaintiff received monthly statements and vouchers from the defendant bank and from the Spokane and Eastern Trust Company and the Union National Bank, the drawee bank, and that by a proper check of its business it should have discovered the embezzlements by Turrell and that not so discovering such emblezzlements and consequently not notifying the defendant of Turrell's lack of authority to do what he was doing that plaintiff became estopped to deny that Turrell had authority to receive the payments made by the defendant to him in cashing the checks.

The third defense (37) alleges that the plaintiff first notified the defendant of the fraud of Turrell on July 20, 1921, and that it had known of the fraud for some time prior thereto, and that by reason of plaintiff's failure promptly to notify the defendant of the fraud the defendant was deprived of the opportunity to proceed against Turrell and obtain restitution.

The fourth defense (38) alleges that plaintiff had recovered from Turrell certain properties to apply on the embezzlements concerned in this action as well as other misappropriations by him, and that defendant bank had an equitable right to share in the sums so recovered.

A demurrer was interposed by plaintiff to defendant's third affirmative defense which demurrer was overruled, and by a reply the material allegations of

defendant's answer were put in issue. The cause proceeded to trial before a jury. The parties agreed (73) that defendant should participate, if judgment should be rendered against it, in the proceeds realized from Turrell, and accordingly the fourth affirmative defense was eliminated by stipulation.

The facts developed at the trial may be summarized as follows:

Neil W. Turrell was employed by the General Cigar Company as bookkeeper and on July 1, 1919, was promoted to cashier of the Portland office of the General Cigar Company. His duties were to have charge of the cash and act as head office clerk, and written authority was conferred upon him to sign checks drawn by the plaintiff on the First National Bank. The letter of authority appears on page 74 of the Transcript and this letter was the only written authority conferred upon Turrell. Deposits in the defendant bank were generally made by plaintiff's bookkeeper who would place a rubber stamp endorsement on the checks and take them to the bank which credited the plaintiff's account. The rubber stamp endorsement was in the form alleged in the complaint: "Pay to the order of the First National Bank, General Cigar Company, Inc." Other evidence was adduced by both parties bearing upon the authority of Turrell, but as all questions of fact have been determined by the verdict of the jury these matters are not now important.

In the year 1920 the books of the Portland branch of the General Cigar Company failed to balance but this

was assumed to be a stock leakage and no suspicion was directed against Turrell or any other office employee. The books were audited and stock checks made at considerable expense but the shortage was not found. On December 31, 1920, Turrell was discharged on account of his work becoming unsatisfactory, but he stayed on for the month of January, 1921, to assist in auditing the books. Since the shortage was not discovered a detective agency was employed and that company found that Turrell had made large deposits in the United States National Bank the source of which could not be satisfactorily explained, and the only explanation developed proved to be false. Later plaintiff's San Francisco office, which was the auditing center for plaintiff's branches on the Pacific Coast, discovered cancelled checks drawn by the Portland office payable to cash and it appearing that similar amounts had been deposited to Turrell's account in another Portland bank contemporaneously therewith it was believed that Turrell had been guilty of embezzlement. This information was developed on May 26th or May 27th, 1921, and at that time plaintiff had no information as to checks which had been transmitted to the Portland branch from other branches specially endorsed and cashed by Turrell, but their information was only as to those checks which Turrell had drawn to cash and cashed at defendant bank. Turrell was indicted and apprehended and steps were taken to attach all properties owned by him. From Turrell's confession and from other sources it was developed that Turrell had accomplished his embezzle-

ments in the manner described in plaintiff's complaint by the conversion of out of town checks, as well as by the cashing of checks drawn on the First National Bank payable to cash. As soon as a complete statement was developed of the embezzlements, a matter in which plaintiff was delayed by reason of the loss of its records and deposit slips by fire occurring in plaintiff's place of business on December 3, 1920, the bank was notified on July 20, 1921, of the embezzlements and the manner in which they were accomplished, and that the plaintiff demanded payment of the sums concerned in the complaint from defendant. It appeared from the testimony that the checks were drawn and endorsed as alleged in the complaint, and that they were cashed by the defendant bank in the manner therein described, which bank received reimbursement therefor from the drawee banks without paying or crediting plaintiff for the amounts received.

It appeared that plaintiff's branches exchanged statements but that Turrell falsified or suppressed such statements so that the embezzlements were concealed from the Portland branch and from the other branches, and it was this manipulation by Turrell that prevented discovery of Turrell's practice of cashing the checks. It appeared from the testimony that statements were rendered monthly with vouchers by the defendant bank to plaintiff and from the banks in Spokane and Seattle to plaintiff's branches in those cities.

In addition to the above testimony plaintiff offered testimony to show that its business in the various cities

were conducted as separate branches and in fact as separate businesses. There was also conflicting evidence as to the practice of banks in cashing checks drawn or endorsed payable to the bank.

In summary it may be said that the evidence adduced at the trial tended to support all the allegations of the complaint and also there was evidence both in support and denial of the defendant's first, second and third affirmative defenses.

Upon the cause being submitted to the jury a verdict was rendered for the defendant. The rulings of the court complained of as error by plaintiff were made in overruling plaintiff's demurrer to defendant's third affirmative answer and in instructing the jury.

A motion for new trial (153) was denied by the trial court, and the ruling is alleged to constitute error.

SPECIFICATION OF ERRORS

The specification of errors will be stated in the order in which they will be taken up in the argument and the various assignments of error grouped thereunder.

1. The Court erred in instructing the jury that the burden of proof lay with the plaintiff to show by the weight of the testimony that the defendant bank paid out the money on the checks to Turrell without authority from the plaintiff and in failing to instruct the jury that the burden of proof was upon the defendant to show that Turrell had authority from plaintiff to receive the money paid him.

Exception No. 6 (111), Assignment No. 7 (140).

Exception No. 11 (117), Assignment No. 12 (145).

2. The court erred in instructing the jury that if they believed that the plaintiff received monthly statements from defendant bank and from the drawee banks and failed to advise defendant within a reasonable time of the irregularities which a comparison of those statements would have revealed, that it is estopped to assert liability on the part of defendant for moneys paid by it to Turrell.

Exception No. 3 (108), Assignment No. 4 (136).

See instructions in full (102).

3. The court erred in instructing the jury that if they believed that a reasonably careful examination of the monthly statements rendered, and cancelled vouchers returned to the plaintiff by the defendant and the drawee banks, would have disclosed to the plaintiff that the amounts for which the checks were drawn had not been credited plaintiff's account, and that the plaintiff made no objection within a reasonable time to the cashing of these checks, that their verdict should be for the defendant.

Exception No. 4 (108), Assignment No. 5 (137)

Exception No. 5 (108), Assignment No. 6 (137)

Exception No. 14 (120), Assignment No. 15 (149)

See instructions in full (103).

4. The court erred in holding that if the plaintiff did not advise the defendant promptly of Turrell's fraud upon learning of that fact that the defendant would be relieved of liability especially in view of the

fact that no evidence was shown as to any damage suffered by plaintiff by reason of the delay, if any, and in view of the fact that it affirmatively appeared that plaintiff recouped so far as possible by prompt action from the embezzler Turrell, and held said sums subject to the participation therein of defendant.

Assignment No. 1 (128)

Exception No. 15 (122), Assignment No. 16 (150)

Exception No. 16 (123), Assignment No. 17 (151)

ARGUMENT

THE PLAINTIFF'S CASE

The right of the plaintiff to recover from the defendant on the facts set forth in its complaint was presented to the court below on demurrer to plaintiff's complaint. The court overruled the demurrer and rendered the opinion which appears on page 29 of the Transcript. Since this ruling was favorable to the plaintiff it is not, of course, included in the assignments of error. We believe, however, that it will be helpful to this court in considering the assignments of error that are made to give consideration to the principles and authorities sustaining the plaintiff's right to recover on the facts stated in its complaint.

It will be observed that the action is brought by the drawer and the payee of checks payable to order. These checks had been specially endorsed by affixing of rub-

ber stamp endorsements to the defendant bank plaintiff's depository. They were thereafter converted by Turrell and when presented to the defendant bank it cashed same paying the money to Turrell. The defendant bank, in the regular course of business, presented the checks to the drawee bank which bank, without question, paid them to the defendant, the special endorsee in possession of the checks.

Accepting these facts as true it is apparent that the defendant bank received possession of the checks from a thief and could obtain no better title than the thief had to them. It is well established that the fact that an individual or bank may be named as a special endorsee or as the payee of a check does not justify that bank or person in cashing the check when presented by one not the drawer or endorser thereof. 3 R. C. L. 981; Bausman vs. Kelly, 38 Minn. 197, 36 N. W. 333; Camp vs. Sturdevant, 16 Neb. 693, 21 N. W. 449; cases collected in 31 L. R. A. N. S. 614, and 1918 B., L. R. A. 576. The reason for this is clear. The person presenting the check is not and does not appear to be the holder thereof and the special endorsee or payee to whom it is presented can only become the holder thereof upon there being a delivery from the drawer or holder. The drawee is not justified in assuming that the person in possession has the authority to make that delivery by reason of the mere fact that he is in possession of the instrument.

The principal contention of the defendant on the demurrer was based upon the fact that the plaintiff was

both the drawer and the payee of the checks and it was argued that by reason of the action of the bank in converting the checks and receiving payment from the drawee banks the plaintiff was not damaged for the reason that the checks could not properly have been charged against plaintiff by the drawee banks. In answer to this argument plaintiff urged, first, that the drawee banks were within their rights in charging plaintiff's accounts with the amounts of the checks concerned and consequently that the funds held by the plaintiff in the drawee banks were diminished by reason of the converting of the checks by the defendant. See cases hereinafter cited. Second, that even if the drawee banks had not been within their rights in cashing the checks it was competent for the plaintiff to ratify the payment and charge the party who caused the wrongful payment to be made. See Fowler vs. Bowers Savings Bank, 113 N. Y. 350; 21 N. E. 172. The court below accepted the first answer of plaintiff to defendant's argument and it was unnecessary for it to consider the second answer presented. We believe that this court will have no hesitancy in following this ruling.

A drawee bank is protected in paying a check whenever it is presented by an endorsee or an apparent endorsee. Thus where a check has been endorsed in blank any person who presents it to the bank, although a thief, may be presumed by the drawee bank to be entitled to receive payment. 2 Daniels Negotiable Instruments 6th Ed. Sec. 1230. The drawee bank is not justified in making this payment where there has been

a forged endorsement. In the instant case the endorsement was not forged but a valid one and when the check was presented by the person who was the special endorsee of the check there was nothing that could put the drawee bank upon suspicion and it was entitled to make the payment to the defendant bank as it did. Indeed the plaintiff's action against the defendant is supported by three precedents precisely in point. Sims vs. United States Trust Company, 103 N. Y. 472; 9 N. E. 605; Bowles Co. vs. Clark, 59 Wash. 336; 109 Pac. 812. Bjorga vs. First National Bank, 127 Minn. 105; 149 N. W. 3. The New York case cited is typical of these cases. The plaintiff in that case drew a check on B. Bank making it payable to the defendant bank. The plaintiff then entrusted the check to one C. with instructions to deliver the check to the defendant bank for purposes of deposit in that bank. C. took the check to the defendant bank and the bank, at his request, delivered to C. a certificate of deposit payable to himself, which certificate he subsequently cashed and converted to his own use. The check was presented by the defendant bank to B. bank by which it was paid to defendant. It was held that the plaintiff could recover from the defendant in an action for money had and received. A decision of contrary inference, Tibby Bros. Glass Company vs. Farmers and Mechanics Bank, 220 Pa. 1, 69 Atl. 280, is criticised in 15 L. R. A. N. S. 519.

We believe that this court will have no hesitancy as accepting as correct the ruling of the court below in regard to the sufficiency of the complaint if indeed any

criticism is made of that ruling by the defendant in error.

ERRORS MADE BY COURT BELOW

The issues tried before the jury in the court below were those made by the three affirmative answers. The first issue was whether Neil W. Turrell had actual or apparent authority to cash checks received by the plaintiff from its out of town branches. The second issue was whether the plaintiff was estopped by reason of the receiving of monthly statements and vouchers from the various banks or by reason of a failure to exercise due care in the conduct of its business in relation to the supervision of Turrell's work from asserting claim against the bank on account of (a) all the checks cashed by defendant involved in this action, or (b) the checks cashed by defendant after the time when by reason of said monthly statements or by reason of proper supervision the defalcations should have been discovered. The third issue was whether the plaintiff exercised reasonable diligence and promptness in notifying the defendant after discovering Turrell's fraud and if not what consequences followed by reason of that failure. In a word, the issues were (1) authority, (2) estoppel by accounts stated, or negligence, and (3) release by suppression of facts.

We believe that a consideration of the record in this case will convince the court that error extremely prejudicial to the plaintiff was made by the court below on each of these three main issues in the action. The

errors complained of in the specification of errors are not technical. On the other hand, by reason of them, a verdict was practically *directed* for the defendant when the plaintiff was entitled to have the issues presented determined by the jury.

We have not in the specification of errors in this brief included all of the exceptions taken as shown by the bill of exceptions, nor all of the assignments of error included in the Transcript of Record. In our opinion forcible arguments could be adduced in support of certain of the assignments and exceptions omitted from the specifications of errors, but we have chosen to include in the specification of errors and to make the subject of argument in this brief only those rulings which, being made the subject of objection and exception, are so clearly in errror and so highly prejudicial to the plaintiff as to, in our opinion, undoubtedly require the reversal of the judgment below and the awarding to the plaintiff of a new and fairer trial.

BURDEN OF PROOF TO SHOW AUTHORITY

The court below instructed the jury:

> "Now, gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money without authority from the plaintiff, either real or apparent. * * * The burden of proof, gentlemen, is simply the weight of the testimony. It

is such weight that would carry the scales of justice down upon one side or the other; and in considering the question as to whether these parties have made out their case by the burden of proof as I have mentioned to you, you will determine whether the weight of testimony is upon that side." (105.)

To which instruction exception was duly taken (111), and was assigned as error (140), and is mentioned *supra* as plaintiff's first specification of error. Instruction, placing the burden of proof to show authority in Turrell to receive payment on defendant bank was refused and exception was duly taken (117). Such refusal is assigned by the 12th Assignment of Error (145).

The rule of procedure is accepted universally to be, that the party who relies upon the existence of an authority, whether express or implied, actual or apparent, limited or general, has the burden of proof to establish by the weight and preponderance of the evidence the existence of that authority.

Of this the following cases are illustrative:

In Smith vs. Campbell, 85 Or. 423, it is said:

"Counsel for defendant correctly submits that where a third party is sought to be held upon a contract alleged to have been executed by an agent the party seeking to enforce the contract must establish the alleged agency (citing cases); that an agent's authority cannot be proved by his own statements that he is such an agent and before the acts of the agent can be shown against the principal

the agency must be shown (citing cases)."

In the recent Oregon case of Jones vs. Marshall-Wells Company, 208 Pac. 768, the above citation was cited and approved.

In Sears vs. Daly, 43 Or. 356, it was said:

> "The question upon the trial of this branch of the case was whether the act of the party signing the note, if not Mrs. Daly, was binding on her either because she authorized or subsequently ratified it, and the burden of proof was upon the plaintiff to establish the agency or ratification." (This case was reversed because the burden of proof had been improperly assigned in the court below.)

In Rumble vs. Cummings, 52 Or. 208, the language of the court is:

> "When a third party relies upon a contract which he effected with a person who claims to be an agent, he must, when the agency is disputed, prove either, first, that the individual, who thus undertook to transact with him some business for another, was expressly empowered by the latter to make agreements for him, and that the terms of the contract, which are sought to be established, are within the scope of the authority conferred; or, second, that the principal knowingly permitted the agent to assume that he had liberty to make agreements, or that he held the agent out to the public, in other instances, as possessing requisite power to embrace the execution of the contract involved, in making which the third party had reason to believe

and did believe that the agent had the necessary authority; or, third, that the principal, with full knowledge of the agent's arrogation of power in making a contract on his behalf, accepted the fruits thereof, or with like knowledge, otherwise ratified the unauthorized agreement."

Schutz vs. Jordon, 141 U. S. 213, 35 L. Ed. 705 is also in point.

The rule placing the burden of proof of authority upon the parties who rely upon it, extends equally to the case where the extent of an agent's authority is at issue. as to the case where the existence of an agency is the issue. To this point Schutz vs. Jordon, *supra,* may be quoted as follows:

"It was a denial, it denied the sale; and the burden of proving the sale was on the plaintiffs, and rested with them until the close of the case. It would not establish a purchase by the defendants, that an agent of theirs had made a contract. The plaintiffs must go further, and prove that such agent had authority to make the contract; not to make contracts generally, but to make the contract which in fact was made. A party who seeks to charge a principal for the contracts made by his agent must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff. The plaintiffs would not contend that they had made out a cause of action against the defendants, by proving that Hewes had made a purchase in their name. Of course they

must go further and prove that he had authority to purchase; and they must also prove that the purchase was within the authority conferred. Authority to buy one class of goods would not be authority to buy another and entirely different class. Authority to buy in the usual course of business would not be authority to buy outside of that course of business. And when they rely upon contracts made with Hewes the burden is on them, and continues on them, to establish the contract which in fact was made, and that it was within the scope of his authority as agent."

Counsel for respondent may ingeniously attempt to defend the instruction given by attempting to confuse the burden of going forward with testimony with the burden of establishing an issue by the preponderance of the evidence. We are aware that there are authorities that loosely state that upon the establishment of a general agency the burden of then showing a limitation of that authority passes to the agent's principal, but the expression of these authorities can only be sustained, if they can be sustained at all, by assuming that they treat of the burden of going forward with the testimony and not with the burden of proving the issue by the weight of the evidence.

In the first place even these authorities would not justify the instructions given because, under those authorities, there would have had to have been submitted to the jury the question whether a general agency existed upon which undoubtedly the defendant, as relying

upon the agency, would have the burden of proof. No such instructions were given by the court. Until that general agency had been determined there would be no presumption of the receipt of payment by Turrell being within his authority.

But even if this preliminary instruction had been given, the instruction complained of would have been in error because it places the burden of proof to establish by the weight of the testimony the fact of there being no agency upon the plaintiff, the alleged principal. And it has been held by the Supreme Court of Oregon and in the Federal courts that the burden of proof in the sense of establishing a fact by the weight of the testimony *never shifts* throughout a trial. Instead, if the establishment of a fact is necessary to a party's case he must establish that fact by the weight of the testimony. He may succeed in making a *prima facie* case which throws the burden of rebuttal upon the other party, if the other party desires to rebut the testimony offered, but he must in any event meet the burden of convincing the jury by the preponderance of the evidence of the fact which he has undertaken to establish.

In Hanson vs. O. W. R. & N. Co. 97 Or. 190, the matter of the burden of proof in the sense of the burden to prove by the weight of the testimony a given proposition, was given attention in a learned opinion by Mr. Justice Harris of that court. The case involved a loss by a bailee. In the syllabus it is said:

> "The phrase 'burden of proof' has two meanings, one to express the idea that a named litigant

must, in the end, establish a given proposition in order to succeed; the other to express the idea that at a given stage in the trial it becomes the duty of a certain one of the parties to go forward with the evidence.

"When the words 'burden of proof' are used to express the idea that a named litigant must establish a given proposition then it is not accurate to say that the 'burden of proof' shifts at any stage of the trial."

It was held that the burden of proof was upon a bailor to establish, by the weight of the testimony, that goods were injured through the negligence of the bailee in the sense that he had the burden of showing by the weight of the testimony that the injury occurred through the bailee's fault, and that the burden in that sense of establishing by the weight of the testimony the fact of negligence never shifted throughout the trial and a contrary instruction caused a reversal of the judgment below.

A similar rule is stated in Cohen Company vs. Houck Mfg. Co., C. C. A. 2nd Circuit, 249 Fed. 285, as follows:

"The burden of proof as fixed by the examination of the pleadings does not change although during the progress of the trial the burden of going forward with the evidence to rebut a prima facie may shift."

In the case at bar the trial judge instructed the jury that the burden of proof to establish that Turrell was

not its agent was upon the plaintiff, and he defined that burden of proof as being the duty of establishing the fact by the weight of the testimony. That instruction cannot be defended by the contention that a *prima facie* case of agency had been made because such a *prima facie* case would not have shifted the burden of proof in the sense in which it was defined by the court. The burden of proof in the sense defined by the court was either upon the plaintiff or upon the defendant throughout the case. It could not shift from one party to the other during the course of the trial. We submit that the above authorities establish that such burden of proof was upon the defendant which relied upon the agency to justify its payment and that the court was mistaken in the law in placing the burden upon the plaintiff to disprove the fact of the existence of that authority.

The plaintiff alleged in its complaint that N. W. Turrell wrongfully, without authority from plaintiff, took and converted to his own use said check, endorsed as above stated, and wrongfully, without authority from plaintiff, transferred said check to the defendant. The point may be made by the defendant that by the allegation of Turrell's lack of authority that plaintiff assumed the burden of proving the fact alleged. But the law is otherwise. The fact that in a complaint an unnecessary allegation is pleaded does not require the plaintiff to sustain that allegation at the trial by a preponderance of the evidence. The test is not what is pleaded but what *must* be pleaded to establish the case. The plaintiff would have made its case by pleading ownership of

the check and that defendant had wrongfully presented said check to the drawee bank, obtained payment thereof and failed to account for the proceeds. It would then have become incumbent upon the defendant to plead as a defense the alleged fact that the agent had authority to transfer the check and receive payment therefor. Indeed in this case the defendant accepted this view and pleaded affirmatively the authority of Turrell.

The authorities clearly establish the rules above stated. In 10 R. C. L. 900 the text is:

> "The plaintiff is obligated to prove only the facts necessary to his cause of action. If he alleges some fact not necessary thereto but which is in effect a traverse of some fact which might have been alleged as a defense to the action, and the defendant denies such allegation, this does not change the burden of proof, nor require the plaintiff to introduce any evidence on that subject until the defendant has produced evidence thereon which makes a rebuttal necessary."

In Bell vs. Pleasant, 145 Calif. 410, 416, 78 Pac. 957, the plaintiff had acquired title to certain property under a prior unrecorded deed. The defendant had received a subsequent deed which had been recorded. Both deeds were from the same grantor. The plaintiff brought action against the defendant to have the subsequent deed cancelled and alleged in the complaint that defendant, at the time of receiving this conveyance, had notice of the prior deed. No evidence was introduced at the trial by either party on the subject of notice and

the court found for the defendant. This was reversed on appeal. It was held that as a matter of law the burden of proof was on the defendant to show that he took without notice and the court further said:

> "Defendant claims that plaintiff must prove that defendant had notice because it is one of the facts alleged in her complaint and denied in the answer. This, however, is not the test. The plaintiff was obliged to prove only those facts which were necessary to constitute her cause of action. If she has alleged some fact not necessary to her case but which is in effect a traverse of some fact which might have been alleged in defense to her action, and the defendant denies such allegation, this does not change the burden of proof nor require the plaintiff to introduce any evidence upon that subject until the defendant has produced evidence thereon which makes rebuttal evidence on her part necessary. She is not obliged thus to anticipate a possible defense."

In Stephens vs. Philadelphia Fire Association, 139 Mo. App. 369, 373, 123 S. W. 63, it was held that where the settled doctrine of law placed the proof of a fact upon the defendant insurance company that the burden of proof was not changed where the other party had pleaded the negative in its complaint. The court answered the contention of the insurance company as follows:

> "This is an erroneous construction of the law in reference to the burden of proof and proceeds

upon the mistaken theory that the form of pleading governs as to the burden of proof, and that by changing the form of the pleading the burden of proof can be shifted. Such is not the law. Where the burden of proof lies upon one party it cannot be thrown upon the other party by the form of the pleading."

In 22 C. J. 71 the text is:

"A party is not required to prove negative allegations which are merely necessary as pleadings but constitute no part of his case."

Further authorities in accordance with those quoted on this point are:

Figland vs. Jones, 39 S. D. 40;

State vs. Melton, 8 Mo. 417;

Melone vs. Ruffino, 129 Calif. 514, 62 Pac. 93, 95.

The rule of these cases is in fact embodied in the statutes of Oregon, Section 726, Oregon Laws, as follows:

"Each party shall prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded. * * *"

The burden of proof having been improperly placed upon the plaintiff instead of the defendant in regard to one of the most important issues in the case it follows that such a ruling was highly prejudicial to the plaintiff

and requires the reversal of the judgment below and the awarding of a new trial. Invairably where the burden of proof has been improperly assigned the error is considered so prejudicial as to demand a reversal. The compiler of Corpus Juris in 22 C. J. 70 sums up the expressions of the many authorities cited as follows:

> "The rule as to the burden of proof is important and indispensable in the administration of justice, and constitutes a substantial right of the party upon whose adversary the burden rests. It should, therefore, be jealously guarded and rigidly enforced by the courts."

It is seldom that in a matter of this kind authorities can be found presenting precisely the facts and legal principles involved in the case under consideration. So far as the question of agency is concerned, however, we find one case in which the facts were very similar and the precise ruling here complained of was presented to the Appellate Court for review. The decision referred to is that in Dispatch Printing Company vs. National Bank of Commerce, 109 Minn. 440, 124 N. W. 236. The plaintiff, the Dispatch Printing Company, had employed one Sturm to act as its Minneapolis manager and he had power to solicit business and obtain collections. Checks which he received covering collections he deposited in a bank, not the defendant bank, in his own name and this bank in regular course presented them to the defendant bank which was the drawee bank named in the checks and the defendant paid the amount of these checks in regular course. The plaintiff brought

an action against the defendant bank alleging that Sturm endorsed the checks in question without any authority and that the deposit in the bank was without plaintiff's authority or consent. (It will be observed that in this case the validity of the endorsement was disputed which justified an action against the drawee bank. In the instant case the validity of the endorsement was admitted and consequently the plaintiff was without remedy against the drawee bank.) An answer put in issue the allegations of the complaint and authority in Sturm to make the endorsements was pleaded as a first affirmative defense and an estoppel against the plaintiff as a second defense. The trial court instructed the jury that the burden was upon the plaintiff to show lack of authority in Sturm. A verdict and judgment was rendered for the defendant and on appeal the judgment was reversed because of the error in assigning the burden of proof to the plaintiff. The decision on this point is as follows:

> "Error is also assigned to those portions of the instructions submitting to the jury the question of Sturm's actual or apparent authority to indorse the name of plaintiff upon the checks and to receive the money thereon as its agent. The court, as introductory to its general instructions in this respect, stated to the jury that the burden was upon plaintiff to prove by a fair preponderance of the evidence that Sturm had no actual authority to do the thing complained of. We are of opinion that the court erred in this instruction. It is cle-

mentary that the power of an agent to bind his principal rests entirely upon the authority conferred upon him. Without such authority, for which the principal himself becomes, by act or conduct, responsible, the agent can bind himself only. 'Every person, therefore, who undertakes to deal with an alleged agent, is put upon inquiry, and must discover at his peril that such pretended agent has authority, that it is in its nature and extent sufficient to permit him to do the proposed act, and that its source can be traced to the will of the alleged principal.' 31 Cyc. 1322; Ermentrout vs. Insurance Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481. At the time the Germania Bank received the checks from Sturm it had knowledge that he was the agent of plaintiff, the checks were payable to plaintiff, and were indorsed by Sturm as its manager. He was not a general agent, with unlimited or unrestricted power, but instead was clothed with special or limited authority only, that of soliciting advertising and collecting accounts sent him by the home office of plaintiff. This did not invest him by implication with power or authority to indorse or negotiate for plaintiff commercial paper, and the bank was under special duty to make inquiry respecting his authority to indorse these checks. Deering v. Kelso, 74 Minn. 41, 76 N. W. 792, 73 Am. St. Rep. 324; Jackson Paper Co. v. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St.

Rep. 113; Bank v. Nye, 37 Ind. App. 464, 77 N. E. 295, 117 Am. St. Rep. 333; Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064; N. Y. Iron Mine v. Bank, 39 Mich. 644; Edwards v. Thomas, 2 Mo. App. 282. If the bank relied upon actual authority in Sturm to so act, the burden was upon it to establish the fact. 31 Cyc. 1643; Nicholson v. Pease, 61 Vt. 534, 17 Atl. 720; Whitaker v. Ballard, 178 Mass. 584, 60 N. E. 379; Bank v. Tuck, 101 Ga. 104, 28 S. E. 168; 1 Clark & Skyles, Agency, 506. This rule is supported by the uniform trend of authorities (2 Ency. L. & P. 831), and was in no way changed in the case at bar by the fact that the plaintiff in its case in chief offered evidence of the general authority and employment of Sturm. The court was in error, therefore, in giving this instruction, and that it was prejudicial will admit of no discussion. It left the impression upon the minds of the jury that actual authority existed which plaintiff was required to overcome by a fair preponderance of the evidence, and nothing was said later along in the instructions to overcome the impression so created."

ESTOPPEL BY REASON OF RETURN OF VOUCHERS

Under this general heading consideration will be given to plaintiff's second and third specifications of error.

The instructions of the court dealing with the effect

to be accorded the return of vouchers by the defendant bank to the plaintiff and to the return of vouchers from the Spokane and Eastern Trust Company and the Union National Bank to plaintiff appear in the Transcrip beginning at the top of page 102 and ending with the last full paragraph on page 104.

The first paragraph states that there is a duty resting upon the depositor to examine the periodical statements of a bank and report without unreasonable delay errors discovered, and that if he fails to do so the bank may regard such failure as an admission that the entries are correct. With this instruction we have no particular quarrel although we do not deem it applicable to this case.

The next two paragraphs of the instructions we quote:

> "It is alleged, among other things, that at all times from July 23, 1919, to December 15th of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane & Eastern Trust Company, of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its accounts in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave

the bank no information touching any irregularity affecting such accounts.

"If you find from the evidence in the case that such were the facts, and that the plaintiff was so advised and failed, within a reasonable time, to advise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant."

The jury was instructed by the above that if the plaintiff was informed by reason of the statements rendered by the defendant bank in connection with the statements rendered by the drawee banks of the condition of its accounts in each of these banks touching the amounts of money drawn from the bank by Turrell, but failed within a reasonable time to advise the defendant of the irregularities, then the plaintiff would be estopped from asserting liability of the defendant to it. Analyzing this instruction it appears that it amounts to practically a directed verdict against the plaintiff. Of course the jury found that the plaintiff received statements from the various banks and, of course, those statements, if compared, would show the amounts of money taken and paid in cash by the defendant bank to Turrell. The instruction assumes that advice of the various accounts to the plaintiff was advice to it of the irregularities fixing a duty upon the plaintiff to defendant to compare the statements and vouchers sent by defendant to plain-

tiff with vouchers and statements sent from different sources to other branches of plaintiff in distant cities. We believe that the court was unwarranted in making the assumption that it did. We believe further that on the evidence presented that a jury would not have been justified in making a finding to that effect. This instruction as to the effect of the return of vouchers from the defendant bank, taken in connection with the return of vouchers from the drawee banks, is made the subject of the third exception, the fourth assignment of error, and the second specification of error.

No exception has been taken to the instructions in regard to the knowledge which would be imputed to a depositor who permits his agent to verify bank statements.

By the next two paragraphs the court instructed the jury that if they believed from the evidence that a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff by the defendant and by the drawee banks would have disclosed to plaintiff that the checks which Turrell had cashed had not been credited to the plaintiff's account by the defendant bank, and that no objections had been made by plaintiff to defendant as to the cashing of the checks, that they should find for the defendant. This instruction is made the subject of the Fourth and Fifth Exceptions, the Fifth and Sixth Assignments of Error, and the Third specification of error. This instruction is, we think, although that is not the cause of our complaint, inconsistent with the instruction just considered

involved in the second specification of error. The inconsistency is that by the latter instruction it is left to the jury to determine whether, in the exercise of due diligence by the plaintiff, the irregularities attributable to Turrell's fraud would have been discovered through a comparison of the various bank statements whereas in the former instruction it was assumed that these irregularities should have been discovered merely because of the receipt of the statements.

The plaintiff in error urges that these instructions are erroneous in the following respects: First, the court either assumes or permits the jury to find that the plaintiff, by receiving statements from the defendant bank of its account in that bank and by failing to detect Turrell's fraud which could not be discovered by the most careful examination of the statements rendered by the defendant, and could only be revealed by an investigation outside of those statements, and by comparison with the statements from the drawee banks, was estopped by reason of negligence from asserting claim against the defendant, both on account of checks cashed before the rendering of statements as well as checks cashed thereafter. Second, the jury was instructed that failure by the plaintiff to exercise due care in checking the statements and vouchers would absolve the defendant from liability regardless of whether it was culpable or not in originally cashing the checks. Third, the plaintiff is held estopped to recover from defendant by reason of a lack of diligence on its part in detecting and advising of the irregularities even though the defendant bank

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suffered no damage by reason of that delay. We will take up these matters in which we believe the court erred in their order.

It is important to bear in mind the exact situation of the parties. It is a fact in this case that the plaintiff was a depositor in the defendant bank. As we see it, however, this is not an essential or distinguishing fact in the case. The check which was cashed by the defendant for Turrell never became a subject of entry in the accounts of plaintiff with defendant. The transactions involved in this cause are not transactions between depositor and bank, and it is but a coincidence that that relation existed between the parties. Let us suppose that the special endorsement had not been to the First National Bank but had been to "any bank or bankers," and Turrell had taken the check to another bank in the city of Portland where he was known, stated that he wished to receive the money for that check, and that bank had cashed it and transmitted in regular course to the drawee bank and received payment. If action was brought against that bank for money had and received or for conversion of the check it would be unable to shield itself by claiming an account stated between the drawee bank and the plaintiff, or between plaintiff's bank of deposit in Portland and plaintiff. The reason would be that the bank that had cashed the check in the suppositious case would have never rendered an account to the plaintiff in regard to the cashed check which would have required the plaintiff to take action to determine its correctness. With this analogy in mind

it would seem apparent that the defendant bank in this case had never rendered to plaintiff an account in regard to the checks cashed for Turrell, and that no account having been rendered as to the transactions here concerned there was not created on the part of plaintiff an obligation to check the correctness of an account that was not rendered.

It is not to be supposed that where one party has converted the property of another, or wrongfully paid out his money, that the injured party will be defeated in its action merely because he has failed to exercise the care which a reasonably prudent man would have exercised to discover the conversion or fraud. In 26 R. C. L. 1141, the text is:

> "Clearly the negligence, if such it may be called, of a party to proceed against one who is known to have taken and used his property unlawfully, does not deprive him of the right to bring trover unless the statute of limitations interposes."

The duty of a depositor to examine the statement and vouchers sent him by a bank arises because the bank, at his request or in accordance with banking usages, has sent a statement purporting to cover the entries and deposits of the account and if that statement is not objected to the bank is justified in assuming the statement correct, and it is incumbent upon the depositors to make a reasonable examination of the statement and the supporting vouchers to determine its correctness. The doctrine is stated in the United States Supreme Court in Leather Mfg. National Bank vs. Morgan, 117 U. S. 96, as follows:

ments of account, or the lists made up by Pinkham for deposit, or the lists of deposit rendered by the bank, of any further transactions between the bank and the mill company. Unlike some of the cases of which note is taken here, where the balances on the stubs of the checks issued were forced and an inspection would have disclosed the irregularity, the bank statements, in comparison with the checkbook and cashbook, exhibit a businesslike and satisfactory record, from which no suspicion of irregularity could arise.

"But it is strenuously urged that, as the Mandan Mercantile Company received a credit on the 5th of April, 1907, and the item went into the cash account of the mill company, it being an item of payment which in the usual course of business should have passed to the credit of the mill company in the bank, the mill company should have taken note of the fact, and that, by pursuing the further inquiry which was subsequently pursued, and sending out to customers for their statements of account, the peculations of Pinkham would have been disclosed, and thus the mill company would have been enabled to protect the bank from further cash payments, and ought to have done so. *We think, however, the duty of a depositor towards his bank in relation to the examination of the bank statements, made in connection with its writing up and balancing the depositor's passbook, does not reach to that extremity. The statements, as we have shown, are*

rendered for the purpose of advising the depositor of the state of his account. If those statements tally with the deposit slips made up by the depositor and the checks drawn against the bank, and if the balances agree one with the other, the depositor is not obliged to look further, nor to bear in mind some irregularity that may appear elsewhere in his general books, although a searching inquiry might lead to a discovery of the fraud. The mill company was unable to ascertain what had happened, until it sent out to its customers for statements of their accounts and called in experts to determine the condition of its books. It was then discovered that the Mandan Mercantile Company credit was given on April 5th, which gave a clue to the line of inquiry, and led to a discovery of the fact that that item did not appear in the bank deposit, as it should have done; and it was found that, if the items in the mill company's cash account had been checked with the deposit account, it would have shown that this item had not been deposited, although it is probable the cash had been drawn from the bank, in this particular instance, and put in the cash drawer of the mill company. The inquiry which the defendant would have had the plaintiff pursue to discover the fraud is collateral to an examination of the pass-book and the record of checks drawn against the bank account, and it does not seem to us that the plaintiff was guilty of such negligence in relation thereto as that the question should have been sub-

mitted to the jury. We find no error, therefore, in the court's refusal to give the instructions requested by plaintiff."

The only variation in facts between the case last cited and the instant case is that in that case it was necessary to refer to the statements of customers to detect the embezzlement while in the instant case it was necessary to refer to the statements of the drawee banks, but that variation we submit does not serve to distinguish the cases. In both the statement of the defendant bank was not concerned with the transaction involved in the action. In both cases the fraudulent transaction could only be detected by a comparison of the statement rendered with other statements sent by other parties. If this case is affirmed the case of National Bank of Commerce vs. Tacoma Mill Company, *supra,* must be overruled.

We concede that the matter of the return of vouchers was a subject together within other facts to be considered by the jury in determining when, in the exercise of reasonable care, the practices of Turrell should have been discovered, and that when, in the exercise of reasonable care, the practices of Turrell should have been discovered, the plaintiff would be estopped from claiming recovery from defendant as to checks so cashed thereafter. This is the effect of the instruction appearing in the last full paragraph on page 101 of the Transcript. We deny, however, that under the authority of the case last cited there was any evidence to go to the jury in regard to an estoppel as to checks that had been

"See also Farrell v. First National Bank, 263 Fed. 778."

cashed prior to sending of statements and vouchers by defendant to plaintiff covering the deposits in the defendant bank and especially we deny the correctness of the instruction of the court complained of under the second specification of error which goes further and holds that as a matter of law the return of vouchers from defendant to plaintiff, together with the return of vouchers from the drawee banks to plaintiff, create an estoppel against the plaintiff's maintenance of action.

Even if the contentions that we have made were erroneous, and the court was correct in applying the doctrine of estoppel by sending of statements covering the deposit account of plaintiff in regard to a transaction which was not involved in that deposit account, yet the instructions as given would be clearly erroneous as not taking into account certain limitations of the rule of estoppel by the rendering of statements by bank to depositor clearly established by authority.

The first limitation referred to is that the doctrine of estoppel by reason of the failing to exercise reasonable care in the detection of fraud upon the return of statement and vouchers does not apply when the bank was negligent or culpable in the cashing of the checks. The doctrine of estoppel only applies in favor of the bank when it was innocent and blameless in the transaction.

The rule is well expressed in the head note in National Dredging Company vs. Farmers Bank, 6 Penne. (Del.) 580, 69 Atl. 607:

"Where a suit is brought by a depositor to re-

cover from the bank money deposited by him, which the bank has paid out otherwise than in conformity with his orders, and the bank sets up the defense that it is nevertheless entitled to charge the depositor with such payments because of the conduct of the depositor subsequent to such payment, the preliminary question to be determined is whether the bank was or was not guilty of negligence in making the payment. If it were negligent, if its officers be found to have failed to exercise due and reasonable care in detecting the forgery, or fraud, then the negligence of the depositor, by his failure to perform his duty in examining his pass book and vouchers with reasonable care and report to the bank within a reasonable time any errors or mistakes, would constitute no defense."

This limitation received the approval of the United States Supreme Court in the case of Leather Manufacturers National Bank vs. Morgan, 117 U. S. 96 at page 112, where it is said:

> "Of course if the defendant's officers before paying the altered checks could by proper care and skill have detected the forgery then it cannot receive a credit for the amount of these checks even if the depositor omitted all examination of his account."

The rule was applied in Manufacturers National Bank vs. Barnes, 65 Ill. 69. In that case a depositor, being obliged to leave the city for a short time gave to a clerk a power of attorney authorizing him to draw

checks on the bank for fifteen days and lodged this power of attorney with the bank. After his return, and at the end of the fifteen days, the clerk continued to draw checks and the bank to pay them. It was held that this constituted negligence on the part of the bank, which could not be excused merely by the failure of the depositor to examine the return checks. This case was followed in Merchants National Bank vs. Nichols and S. Co. 223 Ill. 41, 79 N. E. 38. In that case a bank had paid an overdraft by an agent upon the account of his principal without ascertaining the authority of the agent. It was held that this was such negligence on the part of the bank that it could not assert an estoppel against the principal on account of his failure to examine the pass book and returned vouchers after the balancing of the account and recovery against the bank was allowed. Similar rulings were made in Brixen vs. Deseret National Bank, 5 Utah 504, 18 Pac. 43, and in New York Produce Exchange Bank vs. Houston, 95 C. C. A. 251, 169 Fed. 785. The authorities are collected on this point in note in L. R. A. 1915 D. at page 753, and in 13 Rose's Notes 325.

The Transcript reveals that there was evidence in this case which the jury might have believed to the effect that the defendant bank was negligent and culpable in cashing the checks for Turrell. It appears from page 86 of the Transcript that a witness stated that Mr. Jones, the vice-president of defendant bank, had said "that he thought it was a very . . . a peculiar thing that they had cashed these checks because they

had all been expressly ordered not to do that sort of thing." A witness for plaintiff testified that in the period of twenty-four years the plaintiff had never had checks cashed when stamped with the rubber stamp endorsement. Under the instructions given by the trial court the jury could have found that Turrell had no authority, actual or apparent, to receive moneys on these checks and that the bank was negligent in cashing them for him, but nevertheless if they found statements of account were rendered by defendant to plaintiff they could have found for the defendant on the ground that the plaintiff was estopped by reason of the return of those statements, yet, under the authorities above cited, no estoppel should have arisen against plaintiff where the defendant bank was itself negligent.

The court instructed the jury that the estoppel against plaintiff, by reason of failing to exercise due care in examination of vouchers, would arise regardless of whether the defendant bank was injured by reason of that negligence. We believe that the doctrine of estoppel should apply only in case and to the extent that the bank was injured by the failure to use due care in examination of vouchers by the depositor.

In this case no evidence was introduced by the defendant showing loss by it by reason of plaintiff's failure to promptly discover the fraud of Turrell in regard to the checks cashed before such fraud should have been discovered, and under the instructions given by the court it was not necessary for such loss to appear for the jury to find for the defendant on this issue. In Note 1915

D L. R. A. N. S. page 750, the Annotater states:

> "Although the depositor has failed in the duty which rests upon him as to the examination of his account from the return of the pass book and cancelled checks, still he is entitled to recover from the bank money wrongfully paid out by it if it has suffered no damage from the depositor's dereliction of duty."

A leading case on this point is Janin vs. London and S. F. Bank, 92 Calif. 14 27 Pac. 1100. In that case the plaintiff was a depositor in the defendant bank and the defendant paid money on a forged check purporting to have been drawn by the plaintiff. One of the defenses of the bank was an alleged estoppel on account of plaintiff's failure to notify the defendant of loss within a reasonable time after the return of statement and vouchers to it. Judgment was rendered for plaintiff and the court said:

> "If plaintiff was negligent it was not shown that the defendant suffered any damage thereby and for that reason such negligence cannot be allowed as a defense to plaintiff's right to recover in this action."

The following cases are to the same effect: Lieber vs. Fourth National Bank, 137 Mo. App. 158, 117 S. W. 672; Weinstein vs. National Bank, 69 Tex. 38, 6 S. W. 171. It has been held in a number of cases that where a depositor has been derelict in his duty to examine an account as shown by pass book and vouchers, the bank is relieved of liability only to the extent to

which it has been damaged. First National Bank vs. Allen, 100 Ala. 476, 14 So. 335. Critten vs. Chemical National Bank, 171 N. Y. 219, 63 N. E. 969.

We were aware that counsel for defendant in error may cite cases which reach or appear to reach conclusions different from those contained in the cases just cited. Undoubtedly, however, the position for which we contend, namely, that estoppel will arise in favor of the bank only where negligence of the depositor in examining his account causes loss to the bank is sustained by the great majority of the decisions. The case of Leather Manufacturers National Bank vs. Morgan, *Supra,* is not in its holding contrary to the majority doctrine. In this case there was evidence tending to show negligence by the depositor in the examination of statements and vouchers, and that this negligence caused delay in discovering the forgeries committed and the prosecution of the guilty party. It was held under these facts that it was error to direct a verdict for the plaintiff depositor and against the defendant bank. The case holds, therefore, that the deprivation of an opportunity to proceed against the forger or thief is in itself a sufficient fact to take the case to the jury on the question of loss to the bank. It does not hold, certainly, as was held in this case and as the jury was told by the instructions of the court, that such delay is conclusive as to loss by the bank. This was the view taken of the decision in Janin vs. London and S. F. Bank, 92 Calif. 14, *Supra,* at page 26.

DELAY IN NOTIFYING BANK OF FRAUD AFTER KNOWLEDGE THEREOF

Upon demurrer to the third affirmative answer the court below was called upon to decide as to whether the fact of delay for an unreasonable time after discovering Turrell's fraud in notifying the defendant bank thereof would estop the plaintiff from recovering in this action. The court held that on these facts an estoppel would arise against the plaintiff. By the 16th Assignment of Error (150) it appears that the plaintiff in error requested instructions that as it affirmatively appeared in the case that all of Turrell's property had been attached by the General Cigar Compay and was held subject to the decree of court, that no harm resulted to defendant bank on account of any delay that might have existed in notifying the bank of claim, and that consequently the jury should ignore the 3rd affirmative defense. This instruction was refused and the jury was instructed (104) that if they found the allegations of the 3rd affirmative defense to be true that they should find for the defendant. The rulings in these respects are assigned as error by the Fourth Specification of Error in this brief.

The matters involved in the Fourth Specification of Error are so interwoven with the matters involved in the Second and Third Specifications of Error that they do not readily admit of separate treatment. Indeed, it is probably true that the third affirmative answer adds nothing to the second affirmative answer. It would seem immaterial whether the negligence of the plaintiff,

assigned by defendant, existed in the failure promptly to discover the fraud or in the failure promptly to notify of the fraud when discovered. See comment on this in note 20 L. R. A. N. S. 82.

Plaintiff in Error urges that the ruling on demurrer and the instructions of the court were in error on this point because first, they assume a duty to notify the bank, and secondly, because of the ruling that an estoppel would arise regardless of whether loss resulted to the bank.

It is unnecessary to repeat the argument made on the first mentioned point under the last heading. The duty to exercise due care in discovering a conversion of one's property or in notifying a converter, no matter how innocent of that conversion, so that he may exercise a remedy against some other party who may be responsible to him does not exist unless it is to be found in relationship of banker and depositor and because of the custom and business usage among bankers and depositors for the former to render the latter statements and vouchers and a duty upon the latter to make reasonable examination to determine their correctness. We repeat that the transaction involved in the present case is not one arising from the relationship of banker and depositor but is entirely outside of that relationship.

In the third affirmative answer no loss to the defendant is alleged. It appears from the bill of exceptions (77) that the property of Turrell was attached as soon as the forgery was detected. It further appears from the fourth affirmative answer (39) that Turrell

had turned over to a trustee all of his property, and from page 73 of the transcript it appears by stipulation of the parties that this affirmative defense was eliminated from the consideration of the jury, it having been agreed that the defendant, if held liable in this action, should share in the trust fund.

Whatever may be the rule as to estoppel without proof of loss by reason of the depositor's negligence where the negligence relates to matters of account between the bank and depositor, it would seem clear that where the transaction is not concerned in the accounts and there is no opportunity for the application of the doctrine of account stated, that then the general rule that to create an estoppel there must be a loss upon the party asserting the estoppel would apply. This as a general rule cannot be questioned. In the case of Blum vs. Whipple, 194 Mass. 253, 80 N. E. 501, it was applied in a situation very similar to the one presented in this case. The action was for conversion of two checks payable to the plaintiff and endorsed without plaintiff's authority by one Newman to the defendants. A defense was set up that the defendant had delayed for two years after knowledge of the forgery in notifying defendant thereof. It was held that this was not sufficient as a defense unless it appeared that some loss was suffered by reason of the delay. The court said:

> "Nor did the plaintiff receive any benefit from Newman's acts as in Bingham vs. Peters, 1 Gray 139, nor was there any legal duty incumbent upon the plaintiff to give prompt notice of the facts and

of the claims to the defendant; its delay to be nothing more than one of the circumstances to be weighed against it. (On the issue of ratification) * * * Here, as in that case, (Murphy vs. Metropolitan National Bank, 191 Mass. 159, 77 N. E. 693, it did not appear that any loss was caused to the defendants or that their position was in any way changed by the failure of the plaintiff to notify them earlier than it did. Hamlin vs. Sears, 82 N. Y. 327. Indeed it affirmatively appears that the plaintiff, as soon as it learned of these transactions, instituted criminal proceedings against Newman but that he has never since been located * * *; and these facts are competent to show that the defendants have not been injured by plaintiff's failure to give them any earlier notice."

The decisions cited by the court below, in its opinion on the demurrer (42) are not in point. The case of Union National Bank vs. Farmers and Mechanics National Bank, 271 Pa. 107, 114 Atl. 506, was a case of where the plaintiff drawee bank of a forged check attempted to throw the loss upon the bank immediately remitting to plaintiff. The facts and the plaintiff's theory of the case are quite complicated. Admittedly a drawee bank is presumed to know the signatures of its drawer and where it pays money on the forged signature of the drawer the loss falls upon it. The bank contended, however, that this did not apply where the remitting bank was negligent in not discovering the forgery. It was not alleged that the defendant bank

was negligent but it was alleged that the bank that paid the money to the forger and remitted to the defendant bank was negligent and that the defendant bank had, at all times, sufficient money to charge the item back to the bank originally remitting. It will be observed that this was an action for negligence and it was very properly held that as it appeared that the drawee bank was likewise guilty of negligence in not notifying the remitting banks of the forgery that there could be no recovery. Any language used in this decision should be read in connection with the facts involved, which bear no similarity to those in the instant case.

The case of McNeely Co. vs. Bank of North America, 221 Pa. 588, 70 Atl. 891, involved forgeries by an employee of the plaintiff depositor of the names of payees on checks drawn by the plaintiff on defendant bank. The checks were returned to the plaintiff by the defendant without protest by them although they knew that they were forgeries. It is held under these facts that the plaintiff was estopped to assert liability on the part of the defendant even though no loss was shown by the defendant. This case illustrates the application of the minority rule where vouchers had been returned which show or should have shown the fact of the fraud. A large number of cases opposing the doctrine of this case, many of which have been cited *supra*, are stated in note to this case in 20 L. R. A. N. S. 79. The case of U. S. vs. National Exchange Bank, 45 Fed. 163, is also a case where the name of the payee had been forged and the check had been returned to the United States Postal

Department and no notice had been given the bank of the forgery. This case, it is apparent, involves the situation where the forged check was the subject of account between the depositor and the bank.

The court below, in its opinion (42) on the demurrer to the third affirmative answer, stated:

> "The rule seems to be, as it respects loss through forgery, that the opportunity to proceed against the forger is a valuable one, the deprivation of which, by failure to give notice promptly, conclusively determines that loss has resulted, for there is no way by which it can be satisfactorily determined that there was no loss, unless it be shown there is on hand a fund belonging to the forger out of which the defendant can reimburse himself in whole or in part."

We criticise the statement of this rule because it is made to apply to all cases of fraud. In fact its application is restricted to those cases where, by reason of accounts being exchanged between the parties through the custom of the banking business, a duty is cast upon the party complaining of the forgery to examine the accounts rendered and supporting vouchers to determine their correctness. We further criticise the rule in that it states the minority rather than the majority doctrine in saying that by failure to give notice promptly the fact of loss is conclusively determined. Applying the rule as so criticised to the instant case we find that no account was ever rendered by the defendant to the plaintiff involving the particular checks concerned here and

"See opinion Circuit Judge Lowell in U. S. v. Nat. Exch. Bank, 141 Fed. 209, criticising the case just discussed."

further not only does it not appear that the defendant suffered loss but it affirmatively appears that by the prompt action of plaintiff the loss was recouped as far as possible from Turrell and the property so recouped was made available to defendant. By failing to observe these distinctions we contend that the court below committed the errors complained of in this branch of the case.

* * * *

The peculations of Turrell extended over a considerable period of time. While an employee of the plaintiff he accomplished the thefts involved in this action through the assistance, although unwitting, of defendant's officers and employees. The plaintiff has felt from the time that these transactions were first discovered and now feels that the negligence and fault of the defendant in paying to Turrell the face amount of the checks in cash in the manner that it did was astounding—a practice indulged in by defendant in entire contravention of the considerations of prudence and careful dealing with depositors that should, and generally do, characterize such institutions. The defendant, on the other hand, contends that the plaintiff was lax in its business methods in not discovering the fraud. Thus it appears that the system and business methods of two great organizations are on trial and this fact, as well as the substantial sum involved, renders this cause of consequence to the parties litigant, and to the business world as well. We respectfully submit that the rulings

of the District Court complained of were in error and require reversal of this case and necessitate a new trial upon proper issues.

Respectfully submitted,

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